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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 ANTOLIN ANDREW MARKS,

11 Plaintiff,

12 v.

13 JOHN AND JANE DOES, et al.,

14 Defendants.

No. C09-5489 RJB/KLS

REPORT AND RECOMMENDATION

Noted for: February 26, 2010

15 Presently before the Court are the motions to dismiss of Defendants Janet Napolitano,
16 Secretary of the Department of Homeland Security (DHS); Eric Holder, Attorney General of the
17 United States; James T. Hayes, Jr., Director, Office of Detention and Removal, U.S. Immigration
18 and Customs Enforcement ("ICE"); A. Neil Clark, Field Office Director, Office of Detention and
19 Removal, ICE; and, Tom Giles, Assistant Field Office Director/Officer in Charge, Office of
20 Detention and Removal (the "Federal Defendants"). Dkt. 14.¹ Plaintiff Antolin Andrew Marks
21 has failed to file a response to these motions. Under Local Rule 7 (b)(2), Plaintiff's failure to file
22 papers in opposition to a motion may be deemed as an admission that the motion has merit.
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26 ¹ Defendants' concurrently filed motions to dismiss claims (Dkts. 15, 16, 17, 18 and 19), are addressed by the court in separate R&R's and Order to Amend.

1 The Federal Defendants argue that, to the extent Plaintiff seeks to assert a toxic exposure
2 claim under the Federal Tort Claims Act (“FTCA”), the claim must be dismissed because
3 Plaintiff has (1) failed to name the proper party; and (2) failed to exhaust his administrative
4 remedies under the FTCA. Dkt. 14, p. 2. Federal Defendants further argue that Plaintiff’s
5 claims for injunctive relief against them must be dismissed because (1) there is no injunctive
6 relief under the FTCA; (2) it is not clear there is injunctive relief under *Bivens* in official
7 capacity claims; and (3) even if injunctive relief were available, Plaintiff’s claims are moot
8 because he is no longer subject to the alleged harm. *Id.*

10 Having reviewed the Federal Defendants’ motion and balance of the record, the court
11 recommends that the motion to dismiss be granted as to Defendants Napolitano and Holder
12 because the only relief sought against them is for injunctive relief.

13 I. STANDARD OF REVIEW

14 A. Motion to Dismiss

15 The Court’s review of a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) is
16 limited to the complaint. *Lee v. City of Los Angeles*, 250 F.3d 668 at 688 (9th Cir. 2001).
17 However, a court may take judicial notice of its own records (but not the truth of the contents of
18 all documents found therein), *M/V American Queen v. San Diego Marine Constr. Corp.*, 708
19 F.2d 1483, 1491 (9th Cir. 1983), and may take judicial notice of matters of public record. (See,
20 *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986)), without converting a motion
21 to dismiss into a motion for summary judgment.
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23 All material factual allegations contained in the complaint are taken as admitted and the
24 complaint is to be liberally construed in the light most favorable to the plaintiff. *Jenkins v.*
25 *McKeithen*, 395 U.S. 411, 421 (1969); *Lee*, 250 F.3d at 688. A complaint should not be
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1 dismissed under Fed. R. Civ. P. 12(b)(6), unless it appears beyond doubt that the plaintiff can
2 prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*,
3 355 U.S. 41, 45-46 (1957). Dismissal under Fed. R. Civ. P. 12(b)(6) may be based upon the
4 lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable
5 legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Although
6 the Court must construe pleadings of pro se litigants liberally, the Court may not supply essential
7 elements to the complaint that may not have been initially alleged. *Ivey v. Board of Regents*, 673
8 F.2d 266, 268 (9th Cir. 1982). Similarly, in civil rights actions, a liberal interpretation of the
9 complaint may not supply essential elements of the claim that were not initially pled. *Pena v.*
10 *Gardner*, 976 F.2d 769, 471 (9th Cir. 1992).

12 In order to survive a motion to dismiss, a complaint must also contain sufficient factual
13 matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v.*
14 *Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), citing *Bell Atlantic v. Twombly*,
15 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *Iqbal* held that the plausibility
16 standard announced in *Twombly* means that Fed. R. Civ. P. 8(a)(2) “demands more than an
17 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949.
18 “[N]aked assertion[s]” of illegal conduct devoid of “further factual enhancement” do not
19 suffice. *Id.*, quoting *Twombly*, 550 U.S. at 557. Instead, the complaint “must contain sufficient
20 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*,
21 quoting *Twombly*, 550 U.S. at 570.

22 Before the court may dismiss a pro se complaint for failure to state a claim, it must
23 provide the pro se litigant with notice of the deficiencies of his or her complaint and an
24 opportunity to amend the complaint prior to dismissal. *McGuckin v. Smith*, 974 F.2d 1050, 1055

(9th Cir. 1992); see also *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Cir. 1987). However, leave to amend need not be granted where amendment would be futile or the amended complaint would be subject to dismissal. *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

B. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or Congress, must be neither disregarded nor evaded. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979). The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Once a defendant challenges the facts underlying the jurisdictional allegations in a complaint based on evidence outside the pleadings, the plaintiff bears the burden of establishing, by affidavits or other evidence, that subject matter jurisdiction does in fact exist. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

II. BACKGROUND AND PLAINTIFF'S ALLEGATIONS

A. Prefiling Order

By Order dated August 10, 2009, Chief Judge Robert S. Lasnik determined that Plaintiff may proceed in this action only on his claim that certain Defendants knowingly built the facility in which he is housed on contaminated land and that Plaintiff has developed skin cancer and other injuries attributable to his exposure to toxic chemicals. All other claims asserted in the complaint are barred. Dkt. 7.

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2 **B. Plaintiff's Allegations Related to the Federal Defendants**

3 In his complaint, Mr. Marks states that he is currently housed at the Northwest Detention
4 Center (NWDC). Dkt. 9, p. 2.² Mr. Marks alleges that the NWDC is a superfund clean-up site
5 where the Environmental Protection Agency (EPA) has not conducted any follow-up testing. *Id.*
6 He alleges that during the past three years and seven months that he has been housed at the
7 NWDC, toxic materials under the building have been seeping into the facility through oxidation
8 and evaporation. *Id.*, p. 3. Plaintiff claims that due to these toxins, he is now suffering from the
9 beginnings of skin cancer that cannot be treated at the NWDC and that a pre-existing brain injury
10 has increased since his arrival at the NWDC. *Id.* He further alleges that exposure to the toxic
11 chemicals have caused him to “be susceptible to the cancerous growth of lesions, raised skin, and
12 unidentified things.” *Id.*, p. 6.

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14 Mr. Marks has sued the Federal Defendants as follows:

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16 a) Janet Napolitano, Secretary of DHS, “in her professional capacity for an
17 injunction,” to allow the EPA to conduct testing at the NWDC to determine which cancerous
18 substances are present in the structure and environment of the NWDC, and that the DHS should
19 take immediate steps to provide medical care to Plaintiff “for any ... ailments which could be
20 laid at the feet of the contaminants.” *Id.*, p. 5.

21 b) James Hayes, Director of ICE in his personal and professional capacities. He sues
22 Mr. Hayes in his personal capacity because Mr. Hayes “was an intrinsic part of the mechanism
23 that sought and gained the contract with Geo Group Inc. for the erection of the NWDC. *Id.*, p. 6.
24 Plaintiff seeks \$3,000,000.00 in damages from Mr. Hayes. *Id.*, p. 20.

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² According to Defendants, Mr. Marks was released from immigration custody on May 8, 2009. Dkt. 14, p. 4-5.

1 c) Eric Holder, Attorney General of the United States, “in his professional capacity
2 for an injunction” ordering him to “comply with the necessary actions of the EPA in this case.”

3 *Id.*

4 d) Neil Clark, Field Office Director of ICE, in his personal and professional
5 capacity. *Id.* Plaintiff claims that Mr. Clark has deliberately held the Plaintiff in a facility where
6 Mr. Clark knew there was exposure to toxic chemicals which cause cancers and that he did so
7 with the specific intent to injure the Plaintiff. *Id.*, p. 7.

8 e) Tom Giles, Acting Assistant Field Officer of ICE, in his personal and professional
9 capacity. *Id.*, p. 8. Plaintiff claims that Mr. Giles has deliberately held the Plaintiff in a facility
10 where Mr. Giles knew there was exposure to toxic chemicals which cause cancer and that he did
11 so with the specific intent to injury the Plaintiff. *Id.* Plaintiff seeks \$15,000,000.00 in damages
12 from Mr. Giles. *Id.*, p. 20.

13 14 15 **III. DISCUSSION**

16 **A. Federal Tort Claims Act (FTCA)**

17 Defendants seek dismissal of any and all of Mr. Marks’ claims to the extent that he is
18 seeking recovery under the FTCA for injuries related to his toxic exposure claim. They assert
19 that under the FTCA, the United States is the only proper defendant but then also allege that it
20 would be inappropriate to substitute the United States as the defendant as the Plaintiff has failed
21 to exhaust his administrative remedies as required by 28 U.S.C. 2675(a).

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23 However, 28 U.S.C. 2679(d)(1) requires substitution of the United States as the party
24 defendant only after the attorney general certifies that the defendant employees were acting
25 within the scope of their office or employment. While it appears from the language of the
26 complaint that the individually named defendants were acting within the scope of their office or

1 employment, the trigger is the certification from the Attorney General – which is lacking in this
2 case. Without the certification, the exhaustion of remedies argument is not applicable.

3 Therefore, the Federal Defendants’ motion to dismiss based on failure to comply with the
4 FTCA should be denied.

5 **B. Claims for Injunctive Relief**

6 In his complaint, Mr. Marks names Defendants Napolitano and Holder in their official
7 capacities only and seeks injunctive relief requiring Napolitano and Holder to cooperate with the
8 EPA. Dkt. 9. Plaintiff also seeks an order requiring Defendant Napolitano, Secretary of DHS, to
9 provide medical care to Plaintiff, including “specialists dealing with cancer of the skin, cancer of
10 the brain, and thyroid problems and any other ailments which could be laid at the feet of the
11 contaminants.” *Id.*, p. 6.

12 Defendants argue that Plaintiff’s claims for injunctive relief must be dismissed because
13 (1) if the claims are brought under the FTCA, only money damages are available and as noted
14 above, Plaintiff has failed to name the proper party and exhaust his administrative remedies
15 under the FTCA; (2) it is unclear that injunctive relief is available in a *Bivens* claim and (3) the
16 claims are moot because Mr. Marks has been released from immigration custody and is no longer
17 subject to the alleged harm. Dkt. 14, p. 4.

18 **1. Injunctive Relief Under the FTCA**

19 Injunctive relief is not available under the FTCA. The only relief provided for in the
20 FTCA is money damages. See *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 651 (9th Cir.
21 1992). However, based on the discussion above, it does not appear that the FTCA applies.

22 **2. *Bivens* and Mootness**

23 To the extent Mr. Marks seeks to bring a *Bivens* claim for injunctive relief against these

1 federal Defendants in their official capacities, it is not clear that he can seek injunctive relief
2 under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388
3 (1971). Defendants argue that even if such injunctive relief were available to the Plaintiff in a
4 *Bivens* action, his claims are moot because he is no longer subject to the alleged harm.
5 According to Defendants, Mr. Marks was released from immigration custody on May 8, 2009,
6 and is no longer subject to the alleged toxic chemicals at the Northwest Detention Center
7 (NWDC). Dkt. 14, pp. 4-5.
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9 It is well settled that “the equitable remedy is unavailable absent a showing of irreparable
10 injury, a requirement that cannot be met where there is no showing of any real or immediate
11 threat that the plaintiff will be wronged again - a ‘likelihood of substantial and immediate
12 irreparable injury.’” *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).
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14 Here, Mr. Marks seeks an injunction requiring Janet Napolitano, Secretary of DHS, and
15 Eric Holder, Attorney General, to allow the EPA access to the NWDC to run tests to determine
16 whether there are any “cancerous substances” present and to require DHS to provide him with
17 medical care. Dkt. 9, pp. 5-6. Mr. Marks is no longer in the custody of DHS and/or ICE and
18 because he has been released from custody, is no longer subject to the alleged exposure of toxic
19 chemicals at the NWDC. He, therefore, is unable to show entitlement to an equitable remedy
20 and these two defendants’ motion to dismiss should be granted.
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22 IV. CONCLUSION

23 For the reasons stated above, the undersigned recommends that the motion to dismiss
24 (Dkt. 14) **GRANTED in part** as to Defendants Napolitano and Holder as the only relief sought
25 against them is for injunctive relief and they, therefore, should be dismissed from this lawsuit.
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1 The remaining Federal Defendants' motion to dismiss based on failure to comply with all
2 requirements of the FTCA should, at this time, be denied.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
4 Procedure, the parties shall have fourteen (14) days from service of this Report and
5 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections
6 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
7 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
8 matter for consideration on **February 26, 2010**, as noted in the caption.
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11 DATED this 3rd day of February, 2010.
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15 Karen L. Strombom
16 United States Magistrate Judge
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